



Njoki v University of Nairobi (Employment and Labour Relations Cause 2411 of 2017) [2023] KEELRC 150 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELRC 150 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2411 OF 2017
AN MWAURE, J
JANUARY 26, 2023**

BETWEEN

ESTHER NJOKI CLAIMANT

AND

UNIVERSITY OF NAIROBI RESPONDENT

RULING

1. The Respondent Claimant filed a notice of motion applications dated September 8, 2022. They are seeking for orders:
 1. Spent
 2. Spent
 3. That there be a stay of execution of the judgment and decree delivered on August 4, 2022 pending the hearing and determination of this application.
 4. That this honourable Court be pleased to review the judgment issued by the honourable Justice Anna Ngibuini Mwaure on August 4, 2022 in favour of the Claimant for Kshs 307,800/-
 5. That this honorable Court be pleased to admit the Applicant's submission dated April 18, 2022
 6. That any other order that this honorable Court may deem fit in the circumstances
 7. That the costs of this application be in the cause.



2. The application is supported by the affidavit of Donald Kipkorir and states as follows:-
 - i. On August 4, 2022 the honourable Justice Anna Ngibuini Mwaure issued judgment in favour of the Claimant for Kshs 307,000/-.
 - ii. Upon receipt of a copy of the judgment, the Applicant's advocate confirmed that the Court had not received a copy of the submission by filed by both parties thus the Applicant's advocates submissions were not considered.
 - iii. The Applicant's advocates filed its submissions on April 19, 2022.
 - iv. The omissions was occasioned by the Court registry.
 - v. This is a proper case for the Court's jurisdiction to review its judgment.
 - vi. This application has been made without undue delay as the decree herein was issued on September 2, 2022.
3. The Respondent/Applicant and the Claimant appeared before the honourable Court on October 13, 2023 and the Claimants/Respondent said she was not opposed to the application as they had also filed their submissions by March 29, 2022.
4. The application as earlier said was supported by the affidavit of advocate Donald Kipkorir for the Respondent. He depones that when judgment was delivered by this honourable Court on August 4, 2022 for a Kshs 307,800/- he realized the Applicant's submissions were not considered.
5. He says he had filed them on April 19, 2022 and he avers the omission was occasioned by the Court registry. He says the application has been made without undue delay.

Decision

6. The application is premised on order 45 Rule 1 and order 51 Rule 1 of *Civil Procedure rules*. The rules applicable in this Court are as provided in Section 33 of Employment and Labour Relations Court (Procedure) Rules and state as follows:
 - a. 'If there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - b. On account of some mistake or error apparent on the face of the record;
 - c. If the judgment or ruling requires clarification; or
 - d. For any other sufficient reason.

The said rule read almost verbatim with Order 454 Rule 2 of the Civil Procedure Rules.'

7. There is clear provision of the circumstance under which the Court grants orders for review and in particular where there is discovery of new and important matter or evidence which was not to the knowledge of the applicant or on account of mistake or error apparent on the face of record of where judgment requires clarification.



8. The court had given the parties until April 7, 2022 to put in their submissions but at the time of writing judgment none of the submissions were in the Court file. The Court being conscious of the setback of delaying dispensation of justice proceeded to deliver the judgment on August 4, 2022.

9. The court nevertheless considered the pleadings and the evidence by the respective parties as well as the law and facts in determining the suit. The Court does not find that failure to consider the submissions do prejudice the respective parties under the circumstances. The Court is persuaded by case No 713 of 2018 *Albert Yawa Katsenga vs Kenya Revenue Authority* where the Court held:

'That notwithstanding this Court considered the evidence of the Respondents on record and also considered the facts and the law in arriving to Court's determination. Failure to consider submissions of the Respondent does not in my view prejudice the Respondent at all since all facts and law in the case are considered.'

10. The Court is also reliant on the Court of appeal case *Airtel Networks Kenya Limited vs Nyutu Agrovet Limited Case No 61 of 2021* where the Court held:

'However, and perhaps most important, we are not persuaded by the Applicant that delay in filing written submissions against the backdrop of the filed list of authorities on record stood in the way of hearing and determination of the appeal before this Court. We hasten to observe that, from the reading of Rules 100 and 104 (d) of the Rules of this Court, written submissions are neither obligatory nor a prerequisite to the hearing and determination of an appeal under the Act and the Rules. Furthermore, it is acceptable, as a matter of practice in this Court, for a party to elect to make oral submissions in person or by counsel at the hearing. On the other hand, written submissions are desirable as a practical option in cases where parties do not wish to appear either in person or by counsel. Accordingly, we find as a fact and hold that the delay on the Respondent's part in filing and serving their written submissions did not in any way prejudice the expeditious hearing and determination of the appeal. Neither would such delay amount to disinterest or want of prosecution on account of which dismissal may be justified. We find that no justification was in this case established. This answers the third question – whether failure to file written submissions within the period specified under an order of the Court, as was the case here, constitutes a proper case for dismissal for want of prosecution. In our considered judgment, it does not.'

11. The Court finds there is no valid reason under the circumstances to grant the review orders and as such orders 3, 4, 5, 6 and 7 of the notice of application dated September 8, 2022 are dismissed with no orders as to costs.

Orders accordingly.

Dated, Signed and Delivered virtually in Nairobi this 26th January 2023.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided



by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

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